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Chapter IX

Reservations to treaties

Texts of the draft guidelines of the Guide to Practice in respect of reservations to treaties, with accompanying commentary

Guide to Practice

1. Definitions

1.1 Definition of reservations

"Reservation" means a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

Commentary

1. The definition of reservations adopted by the Commission is none other than the composite text of the definitions contained in the Vienna Conventions of 1969, 1978 and 1986, to which no changes have been made.

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2. This method, which the Commission proposes to follow in principle in the other chapters of the Guide to Practice, is consistent with the position which it adopted in 1995[1] and confirmed in 1997,[2] namely that there should be no change in the relevant provisions of the Vienna Conventions on the law of treaties. This approach met with general approval during the debate on the topic of reservations to treaties in the Sixth Committee of the General Assembly.

3. Article 2, paragraph 1 (d), of the Vienna Convention on the Law of Treaties of 23 May 1969 gives the following definition of reservations:

> "'Reservation' means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State".

4. This definition reproduces the text proposed by the Commission in 1996 in its final draft articles on the law of treaties,[3] and did not give rise to lengthy discussion either within the Commission[4] or during the Vienna Conference. The text of the definition was reproduced in the 1978 Vienna Convention on Succession of States in respect of Treaties and the 1986 Vienna Convention on Treaties between States and International Organizations or between International Organizations, and gave rise to hardly any discussion.[5]

5. It should be noted, however, that article 2, paragraph (1) (j), of the 1978 Convention and article 2, paragraph (1) (d), of the 1986 Convention do not purely and simply reproduce the text of article 2, paragraph (1) (d), of the 1969 definition. Each of them includes a clarification made necessary by the respective purposes of the two instruments:

(a) The 1978 Convention specifies that a reservation can be made by a State "when making a notification of succession to a treaty";

(b) The 1986 Convention adds that an international organization can make a reservation when it expresses its consent to be bound by a treaty by an act of formal confirmation.

6. It is these differences that made it necessary to establish for the purposes of the Guide to Practice a composite text, including the additions made in 1978 and 1986, rather than purely and simply to reproduce the 1969 text.[6]

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[1] See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 10* (A/50/10), para. 491.

[2] Ibid., *Fifty-second Session, Supplement No. 10* (A/52/10), paras. 116-123.

[3] *Yearbook ... 1996*, vol. II, p. 193.

[4] See the definitions proposed by Brierly (*Yearbook ... 1950*, vol. II, doc. A/CN.4/23, para. 84), Fitzmaurice (*Yearbook ... 1956*, vol. II, p. 112) and Waldock (*Yearbook ... 1962*, vol. II, p. 36) and the proposals of the Drafting Committee of 1962 (*Yearbook ... 1962*, vol. I, p. 264) and 1965 (*Yearbook ... 1965*, vol. I, p. 335).

[5] During the Commission's elaboration of the draft articles on this topic, a simplification of the definition was proposed in order to avoid a lengthy enumeration of the moments when a reservation may be made in accordance with the 1969 definition (see *Yearbook ... 1974*, vol. II, part I, p. 306). In 1981, however, the Commission reverted to a text based on the 1969 text (see *Yearbook ... 1981*, vol. II, part II, pp. 122 and 124.

[6] The definition used in this composite text is hereinafter referred to as the "Vienna definition".

7. This definition, embodied in judicial decisions[7] and used in practice by States when making reservations themselves or reacting to reservations made by other contracting parties, has met with general approval in the writings of jurists, even though some authors have criticized it on specific points and have suggested certain additions or amendments.[8]

8. This is also the position of the Commission, some members of which nevertheless drew attention to lacunae or ambiguities in the Vienna definition. It was stated, *inter alia*, that:

(a) This definition combined elements that were purely definitional with others that were more closely identified with the legal regime of reservations, particularly with regard to the moment when a reservation may be formulated;

(b) Moreover, the enumeration of these moments, even when supplemented by the additions made in 1978 and 1986, remained incomplete and did not match the list of means of expression of consent to be bound contained in article 11 of the 1969 and 1986 Conventions;

(c) The definition should be supplemented by a mention of the requirement that reservations must be made in writing; and

(d) It should be made clear that a reservation could – and in the view of one member could only – seek to limit the legal effect of the provisions in respect of which it is made.

9. The Commission was of the view, however, that these objections did not constitute sufficient grounds to call into question the Vienna definition, which could and should be supplemented and clarified in the Guide to Practice, since that was precisely the purpose and *raison d'être* of the Guide.

10. Given the definition used in the Guide to Practice is, from the outset, the one that stems from Vienna Conventions, the commentary to article 2, paragraph (1) (d), of the Commission's draft article, which was reproduced in the Vienna Convention, retains all its relevance:

> "The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the Treaty as adopted".[9]

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[7] See for example the arbitral decision of 30 June 1977, *Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic*, United Nations, Reports of International Arbitral Awards, vol. XVIII, paras. 54-55, pp. 39-40 (the Court of Arbitration had taken note of the parties' agreement to consider that article 2, paragraph (1) (d), of the 1969 Convention – to which they were not parties – correctly defined the reservations – and had drawn the necessary conclusions) or the decision of 5 May 1982 of the European Commission of Human Rights, *Case concerning Temeltasch* (*Decisions and Reports*, April 1983, paras. 69-82, pp. 130-131).

[8] See in particular the definitions proposed by Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, p. 18, and Marjorie Whitman, *Digest of International Law*, vol. 14, 1970, p. 137. See also Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, vol. 5, 1998, p. 83.

[9] *Yearbook ... 1966*, vol. II, commentary to article 2, para. 11, p. 206.

11. This explanation brings out clearly the function of the definitions contained in this first part of the Guide to Practice:[10] the aim is to distinguish between reservations and other unilateral statements made with respect to a treaty (the largest group of which is that of interpretative declarations), since the two are subject to different legal regimes.

12. One should also be aware of the limitations of an endeavour of this kind: however much care is taken to define reservations and to distinguish them from other unilateral statements which have certain elements in common with them, some degree of uncertainty inevitably remains. This is inherent in the application of any definition, which is an exercise in interpretation that depends in part on the circumstances and context and inevitably brings into play the subjectivity of the interpreter.

1.1.1 [1.1.4][11] Object of reservations[12]

A reservation may relate to one or more provisions of a treaty or, more generally, to the way in which the State or international organization intends to implement the treaty as a whole.

Commentary

1. Taken literally, the Vienna definition[13] appears to exclude from the general category of reservations unilateral statements that concern not one specific provision or a number of provisions of a treaty, but the entire text. The aim of draft guideline 1.1.1 is to take into account the well established practice of across-the-board reservations in the interpretation of this definition, a simple reading of which would lead to an interpretation that was too restrictive and contrary to the reality.

2. The wording used by the authors of the Vienna Conventions has been criticized firstly, because of the connection it establishes "between the reservation and the provisions of a convention [...]. Indeed, a reservation is intended to eliminate not a *provision*, but an *obligation*".[14] This criticism does not appear to be well founded, inasmuch as it relates to the definition given in article 2, paragraph 1 (d), of the 1969 Convention, which takes care to make it clear that the objective of the author of the reservation is to exclude or to modify the *legal effect* of certain provisions of the treaty to which the reservation applies and not the provisions themselves.[15]

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[10] The "provisional plan of the study" contained in the second report of the Special Rapporteur consists of five parts (I. Unity or diversity of the legal regime for reservations to multilateral treaties, a topic that was taken up in chapter II of the second report, A/CN.4/477, II. Definition of reservations, III. Formulation and withdrawal of reservations, acceptances and objections, IV. Effects of reservations, acceptances and objections, V. Fate of reservations, acceptances and objections in the case of succession of States, VI. The settlement of disputes linked to the regime for reservations) (A/CN.4/477, para. 37).

[11] The numbers in square brackets refer to the numbering in the Special Rapporteur's third report (A/CN.4/491 and Add.1-6).

[12] This draft guideline will be re-examined in the light of the discussion on interpretative declarations and could be reformulated if necessary. (On the conditions for adoption of this draft, see paragraph 12 above.)

[13] See guideline 1.1 above.

[14] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, p. 15 (italics in the text).

[15] The wording of article 21, paragraph 1, of the 1969 and 1986 Conventions is more questionable, in that it defines the legal effects of reservations as amendments *to the provisions* to which they refer.

3. The second criticism of the wording relates to the use of the expression "certain provisions". It has been noted that it was explained "out of the very commendable desire to exclude reservations that are too general and imprecise [[16]] and that end up annulling the binding character of the treaty", a consideration regarding which it might be queried whether it "should be placed in article 2. In fact, it relates to the validity of reservations. However, it is not because a statement entails impermissible consequences that it should not be considered a reservation. Moreover, practice provides numerous examples of perfectly valid reservations that do not focus on specific provisions: they exclude the application of the treaty as a whole under certain well defined circumstances".[17]

4. We should not confuse, on the one hand, a general reservation characterized by the lack of specificity and general nature of its content and, on the other, an across-the-board reservation concerning the way in which the State or the international organization that formulates it intends to apply the treaty as a whole, but which cannot necessarily be criticized for lack of precision.

5. Across-the-board reservations are a standard practice and, as such have never raised any particular objection. The same is true of reservations that exclude or limit the application of a treaty:

(a) To certain categories of persons;[18]

(b) Or of objects, especially vehicles;[19]

(c) Or to certain situations;[20]

(d) Or to certain territories;[21]

(e) Or in certain specific circumstances;[22]

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[16] Cf. the observations of the Government of Israel on the first draft of the International Law Commission (ILC) (*Yearbook ... 1965*, vol. II, p. 14) or the statement by the representative of Chile at the first session of the Vienna Conference, in 1968 (A/CONF.39/11/SR.4, para. 5).

[17] Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, p. 14–15. Similarly, see for example: Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Y.B.I.L.*, 1970, p. 296.

[18] See, for example, the United Kingdom's reservation concerning the application of the International Covenant on Civil and Political Rights to members of the armed forces and prisoners (*Multilateral treaties deposited with the Secretary-General — Status as at 31 December 1996*, chapter IV, p. 129) or that of Guatemala concerning the application of the Customs Convention on the Temporary Importation of Private Road Vehicles of 4 June 1954 to natural persons only (ibid., chap. XI.A.8, p. 431).

[19] See, for example, Yugoslavia's reservation to the effect that the provisions of the Convention relating to the Unification of Certain Rules concerning Collisions in Inland Navigation shall not apply to vessels exclusively employed by the public authorities (ibid., chap. XII.3, p. 663) or that of Germany to the effect that the Convention on the Registration of Inland Navigation Vessels of 25 January 1965 will not apply to vessels navigating on lakes and belonging to the German Federal Railways (ibid., chap. XII.4, p. 665).

[20] See, for example, the Argentine reservations to the 1982 Convention of the International Telecommunication Union with regard to the possible increase in its contribution and the possibility that the other Parties would not observe their obligations under the Convention (reply by Argentina to the questionnaire on reservations) – or the reservation of France on signature of the final proceedings of the Regional Administrative Conference for the Planning of Maritime Radiobeacons in the European Maritime Area in 1985, concerning the requirements for the adequate operation of the French maritime radio-navigation service using the multifrequency phase metering system (reply by France to the questionnaire on reservations).

[21] See draft guideline 1.1.3 below.

[22] See France's reservation to the General Act of Arbitration of 26 September 1928 to the effect that "... in future [the said accession ... to the Act] shall not extend to disputes relating to any events that may occur in the course of a war in which the French Government is involved." (ibid., p. 1006). (Similar reservations were made by the United Kingdom and New Zealand.) See also the reservations of the

(f) Or for special reasons relating to the international status of their author;[23]

(g) Or to the author's national laws;[24]

etc.

6. Some of these reservations have given rise to objections on grounds of their general nature and lack of precision,[25] and it may be that some of them are tainted by impermissibility for one of the reasons specified in article 19 of the 1969 and 1986 Vienna Conventions. But this impermissibility stems from the legal regime of the reservations and is a separate problem from that of their definition. Furthermore, the inclusion of general reservations in the category of reservations constitutes an indispensable prerequisite to assessing their validity under the rules relating to the legal regime governing reservations: an impermissible reservation (1) is still a reservation and (2) cannot be declared impermissible unless it is a reservation.

7. Another element that support a non-literal interpretation of the Vienna definition relates to the fact that some treaties prohibit across-the-board reservations or certain categories of such reservations, in particular general reservations.[26] Such a clause would be superfluous (and inexplicable) if unilateral statements designed to bring about a general modification of the legal effect of a treaty did not constitute reservations.

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majority of States parties to the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Cases, and of Bacteriological Methods of Warfare whereby this instrument will cease to be binding for the Government of the State making a reservation with regard to any enemy State whose armed forces or whose allies do not respect the prohibitions which are the object of the Protocol. *Status of Multilateral Arms Regulation and Disarmament Agreements*, Fourth Edition 1992, vol. I, p. 11–21).

[23] See, for example, Austria's and Switzerland's reservations to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction of 10 April 1972, with regard to preserving their status of neutrality (Swiss reply to the questionnaire on reservations) or Austria's similar reservation to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 10 December 1976 (*Multilateral Treaties deposited with the Secretary-General — Status as at 31 December 1996*, chap XXVI.1, p. 892) or those of the member countries of the European Community to the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 13 January 1993, to the effect that the provisions of the Convention will be implemented in accordance with their obligations arising from the rules of the Treaties establishing the European Communities to the extent that such rules are applicable (ibid., chap. XXVI.3, p. 904).

[24] See, for example, the reservations of the United States of America, Italy and Japan to the effect that these countries will apply the International Wheat Agreement of 14 March 1986 provisionally within the limitations of internal legislation (ibid., chap. XIX.28, p. 766) or the reservation of Canada to the Convention on the Political Rights of Women of 31 March 1953 "in respect of rights within the legislative jurisdiction of the provinces" (ibid., chap. XVI.1, p. 704).

[25] See, for example, the objections of numerous countries to the reservations made by the Maldives to the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979 concerning the Islamic Sharia (ibid., chap. IV.8, p. 177–182) and also to the reservations made by Egypt to the same Convention. See, in this respect, the articles by Anna Jenefsky, "Permissibility of Egypt's Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Maryland Journal of International Law and Trade*, vol. 15, 1991, pp. 199–233, and by R. Cook, "Reservations to the Convention on the Elimination of All Forms of Discrimination against Women", *Virginia Journal of International Law*, vol. 30, 1990, pp. 643–716. See also the objections of certain countries to the reservation of the United States of America to the Convention on the Prevention and Punishment of the Crime of Genocide, of 9 December 1948, relating to the Constitution of the United States (ibid., chap. IV.1, p. 88).

[26] This is so in the case of article 64, paragraph 1, of the European Convention on Human Rights or article XIX of the Inter-American Convention on Forced Disappearance of Persons (ILM, vol. XXXIII, p. 1532, 1994).

8. The abundance and coherence of the practice of across-the-board reservations (which are not always imprecise and general reservations) and the absence of objections in principle to this type of reservations indicate a social need that it would be absurd to challenge in the name of abstract legal logic. Moreover, the interpretation of rules of law should not be static; article 31, paragraph 3, of the Vienna Convention invites the interpreter of treaty rules to take into account, "together with the context: [...] (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation", and, as the International Court of Justice has strongly underlined, a legal principle should be interpreted in the light of "the subsequent development of law."[27]

9. In order to remove any ambiguity and avoid any controversy, it consequently appears reasonable and useful to establish, in the Guide to Practice, the broad interpretation that States actually give to the apparently restrictive formula of the Vienna definition with regard to the expected effect of reservations. Moreover, contrary to the concerns expressed by some members of the Commission, the formulation utilized should not lead to confusion with interpretative declarations, some of which may indeed purport to indicate "the way in which the State or international organization intends to implement the treaty as a whole", but it is made quite clear here that the provision relates only to unilateral statements, which, for the rest, constitute reservations that meet the requirements of the Vienna definition; this follows from the words "A reservation ..." with which the draft guideline begins.

10. It is evident that such precision in the definition in no way prejudges the permissibility (or impermissibility) of the reservations: whether they relate to certain provisions of the treaty or the treaty as a whole, they are subject to the substantive rules relating to the validity (or permissibility) of reservations.

11. In this respect, the word "may" used in draft guideline 1.1.1 should be interpreted not in the permissive sense implying that States and international organizations "have the right to", but from a purely descriptive point of view as meaning that, in fact, unilateral statements of this across-the-board characteristic are indeed reservations, quite independently of their permissibility. This clearly follows from its inclusion in the first part of the Guide to Practice, which deals exclusively with their definition, and is expressly confirmed by the draft guideline reproduced below and provisionally numbered [1.1.7 bis].

12. Some members of the Commission expressed doubts regarding the wording of draft guideline 1.1.1 [1.1.4]. In their view, the wording applied as much to interpretative declarations as to across-the-board reservations. Other members felt that fear to be justified, given that at the outset, the draft guideline indicated that it related to "A reservation". Nevertheless, the Commission decided that the appropriateness of the wording employed would be "tested" in the light of the discussions relating to interpretative declarations.

1.1.2 Cases in which a reservation may be formulated

The cases in which a reservation may be formulated contained in guideline 1.1 include all the means of expressing consent to be bound by a treaty referred to in article 11 of the 1969 and 1986 Vienna Conventions on the Law of Treaties.

[27] Advisory Opinion of 21 June 1971, *Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, Reports, International Court of Justice (ICJ), 1971, p. 31.

Commentary

1. The purpose of this draft guideline is to seek to remedy a flaw in the wording of the 1969 and 1986 Vienna Conventions, namely that articles 2, paragraph 1 (d), on the one hand, and 11, on the other hand, are not formulated in the same terms, which might give rise to confusion.

2. As indicated in the commentary on guideline 1.1,[28] the inclusion in the Vienna definition of a list of the cases in which a reservation may be made has been criticized, *inter alia* on the grounds that the listing was incomplete and would have been more in place in the articles of the Conventions relating to the legal regime for reservations than in the article defining them.

3. Illogical though it may appear in the abstract, the idea of including time limits on the possibility of making reservations in the definition of reservations itself has progressively gained ground,[29] given the magnitude of the drawbacks in terms of stability of legal relations of a system which would allow parties to formulate a reservation at any moment. It is in fact the principle *pacta sunt servanda* itself which would be called in question, in that at any moment a party to a treaty could, by formulating a reservation, call its treaty obligations in question; in addition, this would excessively complicate the task of the depositary.

4. The fact nonetheless remains that criticisms have been levelled at the restrictive listing in the Vienna Conventions of the moments at which formulation of a reservation can take place. On the one hand, it has been felt that it was incomplete, *inter alia in* that it did not initially take into account the possibility of formulating a reservation on the occasion of a succession of States;[30] but the 1978 Convention on Succession of States with respect to Treaties remedied this omission. Moreover, many authors have pointed out that, in some cases, reservations could validly be formulated at moments other than those provided for in the Vienna definition,[31] and in particular that a treaty may make express provision for the possibility of formulating a reservation at a moment other than the time of signature or of expression of consent to be bound by the treaty.[32]

5. Express consideration of this possibility in the Guide to Practice does not, however, appear to be useful: it is indeed true that a treaty may provide for such an eventuality, but this is then a treaty rule, a *lex specialis* that constitutes a derogation from the general principles established by the Vienna Conventions, which are only intended to substitute for an absence of will, and present no impediment to derogations of this kind. The Guide to Practice with respect to reservations is of the same nature, and it does not appear appropriate to recall under each of its headings that States and international organizations

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[28] Paragraph 8.

[29] The oldest definitions of reservations did not generally include this element *ratione temporis* (see for example those proposed by David Hunter Miller [*Reservations to Treaties: The Effect and Procedure in Regard Thereto*, Washington D.C., 1919, p. 76], Dionisio Anzilotti [*Cours de droit international*, French translation by G. Gidel, Paris, Sirey, vol. I, 1929, p. 399] and R. Genet ["Les réserves dans les traités", *Rev. de D.I. et des Sc. dipl. et pol.*, 1932, p. 103]).

[30] Cf. Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Y.B.I.L.*, 1970, p. 295.

[31] Cf. Ibid. and Giorgio Gaja, "Unruly Treaty Reservations", in *Le droit international à l'heure de sa codification - Études en l'honneur de Roberto Ago*, Giuffrè, Milan, 1987, vol. 1, p. 310-313; D. W. Greig, "Reservations: Equity as a Balancing Factor", *Australian Yearbook of International Law* 1995, pp. 28-29; Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T. M. C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, pp. 41-43 and Paul Reuter, *Introduction au droit des traités*, 3rd edition revised and expanded by Philippe Cahier, Paris, P.U.F., 1995, p. 71.

[32] See *inter alia* Pierre-Henri Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, p. 12.

may depart from it by including in the treaties that they conclude reservations clauses which institute special rules in that respect.

6. On the other hand, even if one confines oneself to general international law it appears that the list of cases in which the formulation of a reservation can take place, as it figures in article 2, paragraph 1, of the Vienna Conventions, does not cover all the means of expressing consent to be bound by a treaty. Yet the spirit of this provision is indeed that a State may formulate (or confirm) a reservation when it expresses its consent, and that it can do so only at that moment. Too much importance must thus not be attached to the letter of this enumeration, which is incomplete and, moreover, does not correspond to that appearing in article 11 of the 1969 and 1986 Conventions.[33]

7. The Commission had moreover clearly perceived the problem when it discussed the draft articles on the law of treaties between States and international organizations or between international organizations, in that initially, on the proposal of its Special Rapporteur, Paul Reuter, it had simplified the definition of reservations and intended to say only that they could be made "by a State or by an international organization when signing or consenting [...] to be bound by a treaty",[34] which was an implicit reference to article 11 of the future Convention. However, out of concern to depart as little as possible from the 1969 text the Commission finally modelled its draft on it, thus abandoning the idea of a useful simplification.[35]

8. The differences in wording between article 2, paragraph 1 (d) and article 11 of the 1969 and 1986 Conventions lie in the omission from the former of these provisions of two possibilities contemplated in the latter: "exchange of instruments constituting a treaty" and "any other means if so agreed". As one member of the Commission pointed out, it is rather improbable that a general multilateral treaty could consist of an exchange of letters. Nevertheless, the possibility cannot be entirely ruled out; nor can the development of means of expressing consent to be bound by a treaty other than those expressly listed in articles 2, paragraph 1 (d), and 11 of the Vienna Conventions. It is to avoid problems arising on these occasions that draft guideline 1.1.2 specifies that no particular importance should be attached to the difference in the wording of these two provisions.

9. Incidentally, the purpose of this guideline is not to fill the gaps in the list that appears in the Vienna definition, particularly the omission of the possibility of reservations formulated when notifying territorial application of a treaty; that is the purpose of draft guideline 1.1.4. More generally, the Commission intends to discuss the problems posed by the formulation of reservations in detail in chapter II of the Guide to Practice.

10. At the suggestion of one of its members, the Commission wondered whether, just as by means of draft guideline 1.1.2 it had sought to harmonize the Vienna definition with article 11 of the 1969 and 1986 Conventions, it should not also specify that the expression "notification of succession" appearing in article 2, paragraph 1 (g), of the 1978 Vienna Convention on Succession of States in respect of Treaties must be interpreted solely in the light of article 18 of that Convention. It seemed to the Commission, however, that it would

[33] Article 11 of the 1986 Vienna Convention: "1. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. 2. The consent of an international organization to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, act of formal confirmation, acceptance, approval or accession, or by any other means if so agreed."

[34] *Yearbook ... 1974*, vol. II, Part 1, p. 145, see also the commentary on the draft in question, ibid., p. 307.

[35] See note 5 above.

be preferable to specify that in the part of the Guide to Practice dealing with succession of States in respect of reservations to treaties.

1.1.3 [1.1.8] Reservations having territorial scope[36]

A unilateral statement by which a State purports to exclude the application of a treaty or some of its provisions to a territory to which that treaty would be applicable in the absence of such a statement constitutes a reservation.

Commentary

1. As its title indicates, this draft guideline concerns unilateral statements by which a State[37] purports to exclude the application of a treaty, in whole or in part, *ratione loci*: the State consents to the application of the treaty as a whole *ratione materiae* except in respect of one or more territories which, in one form or another, are under its jurisdiction.

2. In the past, such reservations consisted primarily of what were known as "colonial reservations", or statements by which the administering Powers announced their intention to apply or not to apply a treaty or certain provisions thereof to all or some of their colonies.[38] Given the current marginal nature of the colonial phenomenon, the problem rarely arises in this form today. It may, however, be useful to determine the legal nature of such statements from the perspective of intertemporal law, with a view to evaluating their permissibility or determining their effect in respect of a treaty that remains in force even though the colonial situation that gave rise to such statements no longer exists.

3. The practice of formulating territorial reservations persists in the context of non-colonial situations, either because a State excludes the application of a treaty to all or part of its own territory[39] or because it is competent, for some other reason, to enter into

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[36] The text of this draft guideline will be reviewed together with draft guidelines 1.1.1 at the Commission's next session.

[37] For obvious reasons, this situation generally does not apply to international organizations, although cases could arise in which an organization with territorial competence might formulate a reservation of this type.

[38] See the reservations of Belgium (excluding the Belgian Congo and the territory of Ruanda-Urundi) or of the British Empire (excluding certain dominions, colonies, etc.) or of France (excluding all protectorates, colonies, possessions or overseas territories under the sovereignty or authority of the French Republic) to the Convention on the International Régime of Railways of 9 December 1923 *(Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chapter II.27, p. 1000) or the reservations of the United Kingdom excluding the application of the Geneva Conventions of 1958 on the territorial sea and the contiguous zone, on the high seas and on fishing in the high seas to the "States in the Persian Gulf" (Ibid., chapter XXI.1, p. 803; XXI.2, p. 809; and XXI.3, p. 813). See also the reservations attached by the Government of the United Kingdom to its consent to be bound by many treaties between 1965 and 1980 following the illegal proclamation of independence by Southern Rhodesia (such as its reservations to the two Covenants of 1966 ["... the provisions of the Covenant shall not apply to Southern Rhodesia unless and until they inform the Secretary-General of the United Nations that they are in a position to ensure that the obligations imposed by the Covenant in respect of that territory can be fully implemented"] (Ibid., chapters IV.3 and IV.4, pp. 115 and 129) or to the International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966 (Ibid., chapter IV.2, p. 101).

[39] For an example of total exclusion of the entire territory of a State, see the reservation of the United States to the Agreement on the International Carriage of Perishable Foodstuffs and on the Special Equipment to be used for such Carriage (ATP) of 1 September 1970 (and the objections raised to this reservation) *(Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chapter XI.B-22, p. 610).

international commitments on behalf of the territory or territories in question, but does not intend to do so.[40]

4. Although the point has been challenged,[41] these unilateral statements constitute reservations within the meaning of the Vienna definition: when formulated on one of the occasions specified, they purport to exclude or to modify the legal effect of the entire treaty[42] or of certain provisions thereof in their application to the author of the statement. In the absence of such a statement, the treaty would apply to the State's entire territory, pursuant to the provisions of article 29 of the 1969 and 1986 Vienna Conventions.[43] Such statements are genuine reservations because they purport the partial exclusion or modification of the treaty's application, which constitutes the very essence of a reservation.

5. Some members of the Commission expressed doubts on this score, arguing, for example, that a territorial reservation may be formulated only if it is expressly provided for in the treaty to which it relates. This is a very strict interpretation of article 29 of the 1969 and 1986 Conventions, which calls for no explicit provision to this effect and admits the possibility of partial territorial application if it "appears" from the treaty or may otherwise be established. In any case, this objection concerns not the definition of reservations, but the conditions in which they are valid. Moreover, a unilateral statement provided for by a treaty is still a reservation even if it is expressly authorized by the treaty; this follows, for example, from article 19 (b) of the 1969 and 1986 Conventions, which envisages the possibility that treaties may provide that only specified reservations may be made. Conversely, if a treaty expressly envisages the possibility of territorial reservations, this does not mean, unless otherwise clearly indicated by the authors of the treaty, that other reservations are necessarily prohibited.[44]

6. It was also stated that it would be difficult to place such territorial reservations under the general legal regime of reservations and, in particular, to formulate objections to them. This is true if such a reservation is explicitly or implicitly allowed by the treaty, which according to a majority of members of the Commission should be the case with respect to any territorial reservation.[45] Thus, the impossibility of objecting to such a reservation arises not from its territorial nature but from its status as a reservation authorized by the treaty. In this respect, there is no distinction between territorial reservations and other types of authorized reservations.

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[40] For an early example, see the declaration made by Denmark upon ratifying the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes of 7 June 1930 excluding Greenland from the scope of application of the Convention *(Multilateral Treaties Deposited with the Secretary-General — Status as at 31 December 1996*, Part II, chapter II.8, p. 969) or, for a more recent example, the declaration made by Australia upon ratifying the Convention on the Political Rights of Women of 31 March 1953 (Ibid., chapter XVI.1, p. 704), or again, that made by Norway in 1985 excluding the territories of Svalbard and Jan Mayen from the application of the Conventions on road traffic and road signs and signals of 8 November 1968 (Ibid., chapter XI.B.19, p. 599).

[41] See, for example, Frank Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, T.M.C. Asser Instituut, Swedish Institute of International Law, Studies in International Law, vol. 5, 1988, pp. 100-101.

[42] See draft guideline 1.1.1 [1.1.4] above.

[43] Article 29 of the 1969 Convention: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

[44] It may be noted, in this connection, that article 19 (b) concerns only treaties providing that "*only* specified reservations" may be made. This does not mean that a treaty could not provide for the possibility of formulating certain reservations without prohibiting other reservations.

[45] This point could probably be addressed in a subsequent guideline of the Guide to Practice relating to article 19 (b) of the 1969 and 1986 Conventions.

7. Lastly, while recognizing that such statements were genuine reservations when they purported to exclude or to modify the legal effect of certain provisions of the treaty, other members questioned whether that was so in the case of statements purporting to totally exclude the treaty's application to a given territory. However, the Commission felt that there were no grounds for drawing a distinction between reservations *ratione materiae* and reservations *ratione loci*. Such a distinction follows neither explicitly nor implicitly from the Vienna definition.

8. It seems self-evident that a territorial reservation must be made, at the latest, by the time the State expresses its consent to be bound by the treaty, if it purports to totally exclude the application of the treaty to a given territory. On this point, there is no ground on which to differentiate the definition of territorial reservations from the general definition of reservations. This is not the case when the State having jurisdiction over the territory in question intends to exclude or modify only partially the treaty's application to this territory. In this case, the reservation may be made not only at the time of signature or of final expression of consent to be bound by the treaty, but also when the State extends the application of the treaty to this territory, which had not previously been subject to its provisions. This particular *ratione temporis* aspect of certain territorial reservations is addressed in draft guideline 1.1.4 [1.1.3].[46]

1.1.4 [1.1.3] Reservations formulated when notifying territorial application

A unilateral statement by which a State purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to a territory in respect of which it is notifying the territorial application of the treaty constitutes a reservation.

Commentary

1. Whereas draft guideline 1.1.3 [1.1.8] deals with the scope *ratione loci* of certain reservations, guideline 1.1.4 [1.1.3] deals with the time factor of the definition: the moment at which certain "territorial reservations"can be made.

2. Generally speaking, a State makes such a reservation upon signing the treaty or when it expresses its definitive consent to be bound by it. This is in fact the only time at which a territorial reservation may be made if that reservation seeks to exclude the territory from the application of the treaty as a whole.[47] That may not however be the case for reservations which seek to exclude or modify the legal effect of some provisions of the treaty in their application to a territory not previously covered by the treaty.

3. The territorial application of a treaty may indeed vary across time either because a State decides to extend the application of a treaty to a territory under its jurisdiction which was not previously covered by the treaty,[48] or because the territory came under its jurisdiction after the entry into force of the treaty, or for any other reason not covered by the provisions concerning reservations to the treaty. In such cases, the State responsible for the territory's international relations may purely and simply extend the treaty to that territory, but it may also choose to do so only partially; in the latter case, upon notifying

[46] The Commission's decision regarding draft guidelines 1.1.1 [1.1.4], referred to in paragraph 12 of the commentary on that provision, and referred to in paragraph 12 of the commentary on that decision, could of course affect the wording of draft guidelines 1.1.3 [1.1.8].

[47] See the above commentary on draft guidelines 1.1.3 [1.1.8] above, paragraph 8.

[48] For example by withdrawing a territorial reservation (see draft guideline 1.1.3 [1.1.8] above).

the depositary of the extension of the territorial application of the treaty, the State also includes in the notification any new reservations specific to that territory. There is no reason to attempt to prevent it from doing so: such a restriction would make it more difficult to extend the territorial application of the treaty and is quite unnecessary provided that the unilateral statement is made in accordance with the legal regime of reservations and is therefore permissible only if compatible with the purpose and objective of the treaty.

4. Some examples of reservations made under such conditions are the reservations made by the United Kingdom on 19 March 1962 upon extending application of the Convention Relating to the Status of Stateless Persons of 28 September 1954 to Fiji, and the State of Singapore and the West Indies[49] and the reservation made by the Netherlands in extending the Convention relating to the Status of Refugees of 28 July 1951 to Surinam on 29 July 1971.[50]

5. There are recent examples of reservations made upon notification of territorial application: on 27 April 1993, Portugal notified the Secretary-General of the United Nations of its intention to extend to Macau application of the two 1966 covenants on human rights; that notification included reservations concerning the territory.[51] On 14 October 1996, the United Kingdom notified the Secretary-General of its decision to apply the Convention on the Elimination of All forms of Discrimination against Women of 18 December 1979 to Hong Kong, with a certain number of reservations.[52] Those reservations caused no reaction or objection on the part of the other Contracting Parties.

6. It would therefore seem wise to make clear, as has in fact been suggested in the writings of jurists,[53] that a unilateral statement made by a State in the context of notification of territorial application constitutes a reservation if it meets the relevant conditions set out by the Vienna definition thus supplemented. To so specify would not of course in any way prejudice issues related to the permissibility of such reservations.

1.1.7 [1.1.1] Reservations formulated jointly

The joint formulation of a reservation by a number of States or international organizations does not affect the unilateral nature of that reservation.

Commentary

1. One of the fundamental characteristics of reservations is that they are unilateral statements,[54] and the majority of the Commission is convinced that this element of the Vienna definition is not subject from exceptions even if, formally, nothing prevents a number of States or international organizations from formulating a reservation jointly, that is to say

[49] *Multilateral Treaties Deposited With the Secretary-General - Status as at 31 December 1996*, chapter V.3, p. 246.

[50] Ibid., chapter V.2, p. 238.

[51] See *Multilateral Treaties Deposited With the Secretary-General – Status at 31 December 1996*, United Nations, New York, 1997, chapter IV.3, p. 118, note 16.

[52] Ibid., chap. IV.8, p. 183, note 10.

[53] Cf. Renata Szafarz, "Reservations to Multilateral Treaties", *Polish Y.B.I.L.*, 1970, p. 295.

[54] Although in the past some authors have had a "contractual" conception of reservations (Cf. Charles Rousseau, *Principes généraux de droit international public*, Paris, Pédone, 1944, vol. 1, p. 290; see also the definition proposed by James L. Brierly in 1950, *IALC Yearbook ... 1950*, vol. 2, p. 238-239, para 84), the adoption of the 1969 Vienna Convention silenced the controversies over this point.

in a single instrument addressed to the depositary of a multilateral treaty in the name of a number of Parties.

2. The practice of concerted reservations is well established: it is perfectly current for States sharing common or similar traditions, interests or ideologies to act in concert with a view to formulating identical or similar reservations to a treaty. That was often done by the eastern European States which pledged allegiance to socialism,[55] the Nordic countries,[56] and the States members of the Council of Europe or the European communities.[57] But each of these reservations was nonetheless formulated individually by each of the States concerned, and this thus poses no problem in relation to the Vienna definition.

3. Nevertheless, during the discussion of the draft which was to become article 2, paragraph 1 (d), of the Vienna Convention, one member of the Commission pointed out that a reservation could be not only concerted, but also joint.[58] At the time, this remark elicited no response, and in practice, it does not appear that States have to date had recourse to joint reservations.[59] The possibility of such reservations cannot however be excluded. It is all the more probable in that, though there are no joint reservations, there are nowadays fairly frequent cases of:

(a) Joint objections to reservations entered by other parties;[60]

(b) Joint interpretative declarations which it is moreover not always easy to distinguish from reservations *stricto sensu*.[61]

4. That the problem may arise in the future thus cannot be ruled out, and the Commission felt that it would be wise to anticipate that possibility in the Guide to Practice.

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[55] See, for example, the reservations by Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Mongolia, Romania and the Union of Soviet Socialist Republics to section 30 of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, some of these reservations have been withdrawn since 1989 (cf. *Multilateral Treaties Deposited with the Secretary-General - Status as at 31 December 1996*, pp. 40 and 41).

[56] See for example the reservations of Finland and Sweden to articles 35 and 58 of the Vienna Convention on Consular Relations of 24 April 1963 (cf. Ibid., chap. III 6, pp. 72 and 73) and those of Denmark, Finland, Iceland and Sweden to article 10 of the International Covenant on Civil and Political Rights of 16 December 1966 (ibid., pp. 123, 124 and 127).

[57] See for example the reservations by Austria (No. 5), Belgium (No. 1), France (No. 6) and Germany (No. 1) to the same 1996 Covenant (ibid., pp. 121-124) and the "declarations" by all the member States of the European community, made *in that capacity*, to the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (ibid., pp. 904-905).

[58] Statement by Mr. Paredes at the 651st meeting, 25 May 1962 (*Yearbook ... 1962*, vol. 1, p. 163, para. 87).

[59] The reservations formulated by an international organization are attributable to it, not to its member States; thus they cannot be termed "joint reservations".

[60] Thus, the European Community and its (then) nine Member States objected, by means of a single instrument, to the "declarations" made by Bulgaria and the German Democratic Republic with respect to article 52, paragraph 3, of the Customs Convention on the International Transport of Goods Under Cover of TIR Carnets, of 4 November 1975, which envisaged the possibility of customs or economic unions becoming Contracting Parties (see *Multilateral Treaties Deposited with the Secretary-General – Status as at 31 December 1996*, chap. XI.A-16, p. 449).

[61] See the declarations made by the European Economic Community and its Member States, or by the latter alone, with respect, for example, to the United Nations Framework Convention on Climate Change of 9 May 1992 (ibid., chap. XXVII.7, p. 940), the Convention on Biological Diversity of 5 June 1992 (ibid., chap. XXVII.8, p. 944) and the Agreement of 4 August 1995 on straddling fish stocks (ibid., chap. XXI.7, pp. 856-857).

5. It felt that there could be nothing against the joint formulation of a reservation by a number of States or international organizations: it is hard to see what could prevent them from doing together what they can without any doubt do separately and in the same terms. This flexibility is all the more necessary in that, with the proliferation of common markets and of customs and economic unions, the precedents constituted by the joint objections and interpretative declarations referred to above will in all probability recur with respect to reservations, given that such institutions often share competence with their member States, and it would be highly artificial to require the latter to act separately from the institution to which they belong. Moreover, in theoretical terms such a practice would certainly not be contrary to the practice of the Vienna definition: a single act on the part of a number of States can be regarded as unilateral if its addressee or addressees are not parties to it.[62]

6. In practical terms, such joint reservations will also possess the great advantage of simplifying the task of the depositary – which would be able to address the text of the jointly formulated reservation to the other parties without having to increase the number of notifications – and of those other parties, which could if they wished react to it by means of a single instrument.

7. The Commission considered the advisability of going further and envisaging the possibility of collective reservations, by which a group of States or international organizations would undertake not only to formulate the reservation jointly, but also to withdraw or modify it exclusively as a group. This would also imply that the other parties would have to accept it or object to it uniformly. Although this course was advocated by one member, it seemed to present more difficulties than advantages:

(a) In practical terms, it would constitute an obstacle to the withdrawal of reservations, which is often considered a "necessary evil",[63] by making the withdrawal of a joint reservation contingent upon the agreement of all the States or international organizations which formulated it;

(b) In theoretical terms, it would imply that a group of parties could impose on the others the rules on reservations agreed upon by them, which is hardly compatible with the principle of privity to treaties; in other words, it might happen that a number of States or international organizations would to agree to consider that the reservation jointly formulated by them may be withdrawn or modified only jointly, but such an agreement would be *res inter alios acta* with regard to the other contracting parties to the treaty to which the reservation relates.

8. These are the reasons for which the Commission, while envisaging the possibility of jointly formulated reservations, decided to specify that such reservations were nonetheless subject to the general regime of reservations, governed largely by their "unilateral" nature, which cannot be affected by such joint formulation.

9. Moreover, it should be specified that the coordinating conjunction "or" used in draft guideline 1.1.7 [1.1.1][64] in no way excludes the possibility of reservations formulated jointly by one or more States and by one or more international organizations, and should be understood to mean "and/or". Nevertheless, the Commission considered that this formulation would make the text too cumbersome.

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[62] This is a case of what may be termed "multi-partite unilateral acts", on this point, see the first report by Mr. V. Rodriquez-Cedeño on unilateral acts of States (document A/CN.4/486, paras. 79 and 133).

[63] See the statement made by Roberto Ago at the 797th meeting of the Commission, 8 June 1965, *Yearbook ... 1965*, vol. I, p. 166.

[64] "... by several States or international organizations ...".

...

The definition of a unilateral statement as constituting a reservation does not prejudge its permissibility or its effects in the light of the rules governing reservations.

Commentary

1. The above draft guideline was adopted provisionally by the Commission. Its title and its placement within the Guide to Practice will be determined at a later stage. In addition, the Commission will consider the possibility of referring, under a single caveat, both to reservations – which are the sole object of this guideline – and to interpretative declarations, which, in the view of some members, pose identical problems.

2. However, this provisional adoption seemed necessary in order to clarify and specify the scope of the entire set of draft guidelines with respect to the definition of reservations adopted thus far, and to make their particular object quite clear.

3. Defining is not the same as regulating. As "a precise statement of the essential nature of a thing",[65] the sole function of a definition is to determine the general category in which a given statement should be classified. However, this classification does not in any way prejudge the validity of the statements in question: a reservation may or may not be permissible, but it remains a reservation if it corresponds to the definition established. *A contrario*, it is not a reservation if it does not meet the criteria set forth in these draft articles (and in those which the Commission intends to adopt in 1999), but this does not necessarily mean that such statements are permissible (or impermissible) from the standpoint of other rules of international law.

4. Furthermore, the exact determination of the nature of a statement is a precondition for the application of a particular legal regime and in the first place for the assessment of its permissibility. It is only once a particular instrument has been defined as a reservation that a decision can be taken as to whether it is permissible or not, its legal scope can be evaluated and its effect can be determined. However, this permissibility and these effects are not otherwise affected by the definition, which requires only that the relevant rules be applied.

5. Draft guideline ... is of particular importance in the light of draft guideline 1.1.1 [1.1.4], in which the verb "may" is used. As indicated in the commentary to this provision, this word should, in this context, be understood as purely descriptive and not as permissive; the Commission does not mean to indicate that an across-the-board reservation is or is not permissible, but only that a unilateral statement of this nature constitutes a reservation and, as such, is subject to the legal regime for reservations. Likewise, the fact that draft guideline 1.1.2 indicates that a reservation "may be formulated" in all of the cases referred to in draft guideline 1.1 and in article 11 of the 1969 and 1986 Vienna Conventions does not mean that such a reservation is necessarily permissible; its permissibility depends on whether it meets the conditions stipulated in the law on reservations to treaties and, in particular, those stipulated in article 19 of these Conventions.

6. More generally, the entire set of draft guidelines adopted thus far are interdependent and cannot be read and understood in isolation from one another.

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[65] The Oxford English Dictionary.